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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GUILLERMO OCHOA,

Defendant and Appellant.

E051020

(Super.Ct.No. RIF129069)

OPINION

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge.

Affirmed with directions.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

In a previous appeal from the judgment of conviction in the instant case, we reversed the jury's true findings on gang enhancement allegations attached to two counts, for lack of substantial evidence, and struck the imposition of sentence on four prior prison terms, for which no finding was rendered. (*People v. Ochoa* (2009) 179 Cal.App.4th 650 (maj. opn.)) The trial court originally imposed a determinate sentence of 10 years followed by an indeterminate term of life with a minimum parole eligibility date of 15 years. On remand, another judge imposed a determinate, aggregate prison sentence of 19 years 8 months.

In this appeal, defendant Guillermo Ochoa contends the sentencing court abused its discretion by imposing the upper term on one count upon which the prior court had imposed the midterm, and by imposing consecutive terms on another count upon which the prior court had imposed a concurrent term. Defendant additionally argues that the abstract of judgment must be amended to delete all references to the gang and prior prison term enhancements. The People concede the latter issue. We shall direct the trial court to make the requested corrections to the abstract of judgment. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND¹

On November 7, 2005, around 9:15 p.m., the victim sat in the passenger seat of his mother's black Ford Ranger as she parked at a fast-food restaurant in Moreno Valley.

¹ By order dated August 10, 2010, we took judicial notice of the record in the prior appeal, case No. E045756. Unless otherwise indicated, the statements of the factual and procedural background of this case come from our opinion in that matter.

The victim waited in the vehicle with the window partially rolled down while his mother went inside the restaurant. A compact car pulled into the parking lot approximately 14 to 15 feet away. Defendant got out of the car and approached the victim.

Defendant pulled a shotgun out of his jacket, pointed it at the victim's face, and asked the victim for his money; the victim showed defendant his wallet and told defendant he did not have any. Defendant loaded the shotgun and told the victim to give him the vehicle. The victim exited the vehicle and ran inside the restaurant. Defendant got into the vehicle and drove away.

A jury convicted defendant of carjacking (count 1—Pen. Code, § 215, subd. (a)),² attempted robbery (count 2—§§ 664, 211), felon in possession of a firearm (count 3—§ 12021, subd. (a)(1)), and active participation in a criminal street gang (count 4—§ 186.22, subd. (a)). The jury hung on the section 186.22, subdivision (b), gang enhancement allegations attached to counts 1 through 3, but found true personal use of a firearm enhancements attached to counts 1 and 2. (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8).) After a second trial on the gang enhancements, another jury found the allegations attached to counts 1 and 3 true, but found the enhancement attached to count 2 not true.

On May 9, 2008, the trial court sentenced defendant to a 10-year determinate term of incarceration followed by life with a minimum parole eligibility date of 15 years; the sentence was composed of the following: On count 1, the court sentenced defendant to life with the possibility of parole and a consecutive 10 years on the attached personal use

² All further statutory references are to the Penal Code unless otherwise indicated.

enhancement; on count 2, the court imposed a concurrent term of 12 years consisting of the midterm of two years plus a consecutive 10 years on the personal use enhancement; on count 3, the court sentenced defendant to a five-year concurrent term consisting of the midterm of two years on the substantive offense with a consecutive three-year term on the attached gang enhancement; on count 4, the court imposed the midterm of two years concurrently; the four section 667.5, subdivision (b), prior prison term enhancements alleged in the information were never tried nor was any finding on them ever rendered; nevertheless, the court imposed concurrent, one-year sentences on each of them.

On May 14, 2010, on remand, another judge imposed an aggregate, determinate prison sentence of 19 years 8 months consisting of the following: the upper term of nine years on count 1 (carjacking); a 10-year consecutive term for the section 12021, subdivision (a)(1) offense attached to count one (personal use of a firearm); the upper term of three years concurrent on count 2 (attempted robbery), stayed pursuant to section 654; a consecutive term of one-third the midterm, or eight months, on count 3 (felon in possession of a firearm); and the midterm of two years on count 4 (active participant in a criminal street gang), stayed pursuant to section 654.

DISCUSSION

A. SENTENCING DISCRETION

Defendant contends the sentencing court essentially abused its discretion in imposing a different sentence than that of the previous sentencing court, i.e., in imposing the *upper* term on count 2 and a *consecutive* term on count 3. Defendant maintains that because the latter sentencing court did not preside over the trial and had not reviewed the

probation report prior to sentencing, it was unable to effectively exercise any discretion it had. Moreover, defendant argues that the initial sentencing court's determinations on imposing the *midterm* on count 2 and a *concurrent* term on count 3 were presumptively correct. We hold that the latter sentencing court acted within its discretion.

Sentencing decisions are reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Defendants bear a heavy burden when attempting to show an abuse of discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) “‘In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

A “trial judge’s original sentencing choices [do] not constrain [the sentencing court] from imposing any sentence permitted under the applicable statutes and rules on remand, subject only to the limitation that the aggregate prison term could not be increased. [Citation.]” (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256 (*Burbine*).)³ “‘When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. [It is n]ot limited to merely striking illegal portions[;] the trial court may reconsider all sentencing choices.

³ Defendant “cannot contend that his aggregate sentence was increased upon resentencing. It was not.” (*People v. Hill* (1986) 185 Cal.App.3d 831, 836.) Indeed, the previous court imposed a 10-year determinate term followed by an indeterminate term of life with a minimum parole eligibility date of 15 years. Defendant’s current aggregate sentence is a determinate term of 19 years 8 months.

[Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.’

[Citations.]” (*Burbine*, at p. 1258.) “[T]rial courts are . . . afforded discretion by rule and statute to reconsider an entire sentencing structure in multicount cases where a portion of the original verdict and resulting sentence has been vacated by a higher court.” (*Ibid.*)

Here, the record amply supports a determination that the sentencing court was sufficiently well-informed regarding the facts of the instant case and the relevant details of defendant’s background, such that it acted appropriately in its imposition of sentence. The sentencing court indicated it had perused the People’s sentencing brief.⁴ The court stated that it had reviewed this court’s opinion in the matter; although it did indicate that it did “not know much about the case,” it provided both the People and the defense ample opportunity to exposit the details of the case and argue the merits of their individual theories of the appropriate sentence. The court queried counsel regarding specific details it believed were crucial to a proper disposition. The court had apparently not been provided with a copy of the probation report by either side. It then unilaterally had court staff obtain a copy. The court then indicated it had reviewed the report.⁵

⁴ Defendant apparently filed no countervailing sentencing brief.

⁵ The probation report reviewed by the court appears to have been the original report prepared for defendant’s initial sentencing. Although it is generally acknowledged that “a supplemental presentence probation report must be prepared for use at a defendant’s resentencing following an appeal,” (*People v. Foley* (1985) 170 Cal.App.3d 1039, 1047) defendant waived preparation of such a report.

The court considered, but discounted, defense counsel's orally enumerated mitigating factors. Defendant contended below that the "facts" that he was intoxicated, that the shotgun was inoperable, and that the victim was not physically harmed, all compelled imposition of low, concurrent terms. As the People noted, the victim testified that defendant loaded or racked the shotgun at the time of the incident, indicating that the shotgun was actually operable. The court concluded that "the aggravated term is appropriate. And I haven't considered the fact that he had a gun, because that is being considered in imposing the firearm enhancement of ten years. But I have considered how he used it. He just didn't have it in his possession. He just didn't display it. He used it in horrific ways. Short of shooting this person he used the gun about as terribly as you can in terms of the terror it must have given to the victim[] in this case. [¶] So I found that very aggravating to take a shotgun, put it in the face of a 16-year-old boy, and say basically your wallet or your life. I thought that was pretty bad conduct and indicated a hardening of the heart, and viciousness that should be taken into account as an aggravating factor." The court noted the vulnerability of the victim. It noted defendant's extensive criminal history consisting of the sustainment of three prior juvenile felony petitions, six prior adult felony convictions, eight prior adult misdemeanor convictions, and numerous parole and probation violations.

As to defendant's "so-called mitigating factors," the court observed "I certainly considered them, but I don't think they're particularly mitigating especially in the face of all these aggravating factors, which I found very compelling." The sentencing court acted well within its discretion. (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 736

[sentencing disposition imposed based upon “picture of all the facts” divulged by perusal of probation report and inquiry of counsel was not an abuse of discretion].)

Defendant relies primarily upon *People v. Stunk* (1995) 31 Cal.App.4th 265, 275 (*Stunk*) for the proposition that a sentencing judge who did not preside over the trial and has “minimal” familiarity with the case abuses its discretion in imposing harsher individual sentencing terms than the prior sentencing judge. We find *Stunk*’s application to this case incongruous. First, *Stunk* did not involve a matter remanded for resentencing after an appeal. Second, unlike *Stunk*, there is nothing in the current record to suggest that it was this superior court’s normal “administrative practice . . . [to] direct[] all sentencing matters to be handled by one judge . . . regardless of whether the trial judge is still actively exercising judicial power.”⁶ (*Id.* at p. 275.) Third, defendant failed to object to any individual imposition of sentence exceeding that imposed by the prior sentencing court. Fourth, defendant failed to object to being sentenced by a judge other than the one who presided over his trial.⁷ Fifth and most importantly, here, unlike in *Stunk*, the

⁶ It is well “settled that it is not error for a judge other than the one who tried a criminal case to pronounce judgment and sentence. [Citation.]” (*People v. Downer* (1962) 57 Cal.2d 800, 816; accord, *Stunk, supra*, 31 Cal.App.4th at p. 275; *People v. Jacobs, supra*, 156 Cal.App.4th at pp. 733-734.) Nevertheless, “it is normally the better procedure for the judge who tried the case and is presumably familiar with the course of the trial and the demeanor of the witnesses to act on the matter of probation and sentence” (*Jacobs*, at p. 738; accord, *Stunk*, at pp. 275 & 276, fn. 13.) Here, however, no reason appears in the record as to why the trial judge did not resentence defendant.

⁷ Although *Stunk* would apparently require no such objection, defendant does not directly challenge his sentencing by a judge other than the one who presided over his trial. Moreover, even if he did, we would find *Stunk* distinguishable because, as noted

[footnote continued on next page]

sentencing court explicitly acknowledged all the mitigating factors specified by defense counsel.⁸ Thus, the sentencing court committed no error in imposing the upper term on count 2 and a consecutive term on count 3.⁹ The court properly considered the interdependent components of defendant's multiple counts of conviction in determining an appropriate aggregate sentence. (*Burbine, supra*, 106 Cal.App.4th at p. 1258; *People v. Calderon* (1993) 20 Cal.App.4th 82, 88.)

B. ABSTRACT OF JUDGMENT

Defendant contends the abstract of judgment should be amended to strike all references to the gang and prior prison term enhancements. The People agree. As noted

[footnote continued from previous page]

above, nothing in the record indicates the superior court regularly assigned sentencing to judges who did not preside over the particular defendants' trials. Finally, we would disagree with *Stunk* to the extent it could be read to never require an objection regardless of the circumstances.

⁸ In *Stunk*, "the sentencing judge exercised his sentencing discretion based solely on the probation officer's report with respect to the conclusion there were no mitigating factors" despite the fact that the defendant later identified "at least three . . . mitigating factors" in the trial record. (*Stunk, supra*, 31 Cal.App.4th at p. 275.) Here, as noted, the trial court explicitly referenced the alleged mitigating factors. Defendant identifies no additional mitigating factors not already considered by the sentencing judge.

⁹ We note that by arguing that the sentencing court abused its discretion in imposing the upper term on count 2 and a consecutive term on count 3, "it is clear that he is attempting to retain the favorable aspects of the prior judgment while jettisoning the unfavorable aspects. [Citations.] Appellate courts have consistently refused to sanction such efforts. [Citations.]" (*People v. Savala* (1983) 147 Cal.App.3d 63, 69, fn. omitted, disapproved on other grounds in *People v. Foley, supra*, 170 Cal.App.3d at p. 1044; accord, *People v. Hill, supra*, 185 Cal.App.3d at p. 835.) Defendant, below, argued that the court should impose the low term on the principal count and the low term, concurrently on the remaining counts. Thus, defendant acknowledged below the sentencing court's power to diverge from the sentence previously imposed on the individual counts.

in our prior opinion, we reversed the gang enhancements attached to counts 1 and 2 and struck imposition of sentence on the prior prison term enhancements. Nevertheless, the current abstract of judgment reflects true findings on all of these enhancements. Thus, we direct the trial court to strike all mention of the enhancements from the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate courts have inherent power to correct clerical errors contained in abstracts of judgment that do not accurately reflect the judgment].)

DISPOSITION

The trial court is directed to correct the abstract of judgment by eliminating any mention of the section 186.22, subdivision (b) gang enhancement allegations and the section 667.5, subdivision (b) prior prison term allegations. The trial court is further directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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/s/ MILLER

J.

We concur:

/s/ RAMIREZ

P. J.

/s/ HOLLENHORST

J.